

**IN THE  
MISSOURI SUPREME COURT**

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<b>STATE ex rel. WILLIAM J. SITTON,</b>	)	
	)	
<b>Petitioner,</b>	)	
	)	
<b>vs.</b>	)	<b>No. SC93020</b>
	)	
<b>JEFF NORMAN, WARDEN,</b>	)	
	)	
<b>Respondent.</b>	)	

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**PETITIONER'S STATEMENT, BRIEF AND ARGUMENT**

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**Respectfully submitted,**

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### **JURISDICTIONAL STATEMENT**

This Court has jurisdiction to issue original writs of habeas corpus pursuant to Article I, Section 12 and Article V, Section 4 of the Constitution of the State of Missouri, Missouri Rule 91.01(b), and § 532.020 *et seq.* RSMo. (2000). This petition is properly before this Court pursuant to Rule 91.02(a) and 84.22(a) because petitioner, who is incarcerated in Jefferson City Correctional Center, Jefferson City, Missouri, previously filed habeas petitions raising this same claim in the Circuit Court of Cole County and later in the Missouri Court of Appeals, Western District.

## **STATEMENT OF FACTS**

Petitioner, William J. Sitton, was convicted following a jury trial held on July 21-22, 2005, in the Circuit Court of Lincoln County, Missouri, of involuntary manslaughter in the first degree, § 565.024 (Count 1), and armed criminal action, § 571.01 (Count 2) (LF 49-54).<sup>1</sup> On September 6, 2005, the trial court sentenced Petitioner to consecutive prison sentences of seven and eighteen years (Tr. 529-30; LF 56-58). His convictions were affirmed by the Missouri Court of Appeals, Eastern District. *State v. Sitton*, 214 S.W.3d 404 (Mo. App. E.D. 2007)

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<sup>1</sup> All statutory references are to RSMo 2000, and all Rule references are to Missouri Court Rules (2006). In addition to Respondent's Return to Writ of Habeas Corpus, Respondent filed as exhibits: A (a copy of trial transcript, designated in this brief as "Tr."); B (a copy of the direct appeal legal file "LF"); C (a copy of Petitioner's brief on direct appeal); D (a copy of the state's brief on direct appeal); and E (a copy of the memorandum opinion of the Missouri Court of Appeals, Eastern District, affirming Petitioner's convictions and sentences). Petitioner will also cite to the exhibits he filed with the Petition for Writ of Habeas Corpus filed previously with this Court, which he will refer to as "Habeas Exhibit," followed by the letter given to that exhibit, (e.g., Habeas Exhibit A).

(Respondent's Exhibit E). Later, the denial of his Rule 29.15 motion was also affirmed. *Sitton v. State*, 294 S.W.3d 137 (Mo. App. E.D. 2009).<sup>2</sup>

Unknown to Petitioner until his former direct appeal attorney learned of it on October 18, 2010 (Habeas Exhibits A-4, E-1 to E-16), at the time of Petitioner's trial, the Lincoln County Circuit Court allowed jurors to "opt out" of jury service by performing six hours of community service and paying a fifty-dollar fee to cover the administrative costs of the community service. *Preston v. State*, 325 S.W.3d 420, 421-422 (Mo. App. E.D. 2010). Five persons who were summoned for jury duty in Lincoln County during the court term encompassing Petitioner's trial took advantage of the "opt out" program. (Habeas Exhibit E-1 to E-16). These jurors who requested to be excused from jury service during the term of service that Petitioner's trial was held (July through October, 2005), were sent a letter by the presiding judge, the Hon. Dan Dildine, giving them the option to serve 6 hours of community service within 60 days at their convenience (and a fine not to exceed \$500.00 if they did not complete the community service). *Id.*

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<sup>2</sup> Casenet reflects that Petitioner's amended Rule 29.15 motion was filed on August 13, 2007, a hearing was held on July 16, 2008, and a judgment denying the Rule 29.15 motion was entered on October 31, 2008. *Sitton v. State*, No. 07L6-CC00066. The opinion in *State ex rel. Koster v. McCarver*, 376 S.W.3d 46, 49 (Mo. App. E.D. 2012) reflects that the Lincoln County Public Defender's office discovered the existence of the opt-out program on or about July 8, 2008.

Those jurors chose the community service option and were allowed to opt out of jury service. *Id.*

Within fourteen days of actual discovery of the issue (October 18, 2010),<sup>3</sup> Petitioner filed an amended motion for new trial in the Circuit Court of Lincoln County on October 25, 2010, which alleged that the opt-out practice for qualified jurors in Lincoln County constituted a fundamental and systemic failure to comply with the statutory jury selection requirements, under §§ **494.400-494.505**. (Habeas Exhibit A-11 to A-15). That motion was denied by operation of law when it was not ruled upon after 90 days, **Rule 29.11(g)** (Habeas Exhibit A-3 to A-4).

On October 21, 2010, Petitioner also filed in the Missouri Court of Appeals, Eastern District, a Motion to Recall the Mandate and Remand for Filing an Amended Motion for New Trial Due to Newly-Discovered Evidence of Improper Jury-Assembly Procedures, which was denied on October 26, 2010. (Habeas Exhibit C-7).

Petitioner is incarcerated in the Jefferson City Correctional Center, Jefferson City, Cole County, Missouri. (Habeas Exhibit A-1). The name of the

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<sup>3</sup> See § **494.465.1**, which allows a party to move for “appropriate relief ... on the ground of substantial failure to comply with the provisions of sections 494.400 to 494.505 ... within fourteen days after the moving party discovers ....the grounds therefor.”



person who is restraining Petitioner's liberty is Jeff Norman, Warden of the Jefferson City Correctional Center, located in Jefferson City, Cole County, Missouri. *Id.*

Petitioner filed a petition for state habeas corpus relief asserting this claim in the circuit court of Cole County on November 30, 2011, and it was denied on March 19, 2012 (Habeas Exhibits A and B). A subsequent petition for writ of habeas corpus was filed in the Missouri Court of Appeals, Western District, on August 2, 2012, and it was denied on August 6, 2012 (Habeas Exhibits C and D).

On December 12, 2012, Petitioner filed his petition for writ of habeas corpus in this Court, which was sustained on February 26, 2013. State ex rel. Sitton v. Norman, No. SC93020. Respondent filed its Return to Writ of Habeas Corpus on March 8, 2013. *Id.* On March 11, 2013, this Court set a briefing schedule with Petitioner's brief due on or about April 5, 2013. *Id.*

Any further facts necessary for the disposition of the petition for writ of habeas corpus will be set out in the argument portion of this brief.

**POINT RELIED ON**

Petitioner was denied due process and equal protection of the law and a jury drawn from a fair cross-section of the population, guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution and Art. I, §§ 10 and 18(a) of the Missouri Constitution, and §§ 494.400-494.505, in that the opt-out practice for qualified jurors in Lincoln County under which petitioner's jury was selected constituted a fundamental and systemic failure to comply with the statutory jury selection requirements under §§ 494.400-494.505, as held in *Preston v. State* and *State ex rel. Koster v. McCarver*.

Petitioner did not procedurally default this claim. He followed the procedure established in § 494.465 and filed an amended motion for new trial raising the issue within fourteen days of discovering the facts establishing the claim. Habeas corpus is the appropriate remedy to enforce this violation of his rights as the claim was not known to him during the time in which he could have raised the issue on direct appeal or in a 29.15 action. He has established prejudice because under *Preston* and *McCarver* prejudice is presumed in such situation.

*Preston v. State*, 325 S.W.3d 420 (Mo. App. E.D. 2010);

*State ex rel. Koster v. McCarver*, 376 S.W.3d 46 (Mo. App. E.D. 2012);

*State v. Sardeson*, 174 S.W.3d 598 (Mo. App. S.D. 2005);

*McGurk v. Stenburg*, 163 F.3d 470 (8<sup>th</sup> Cir. 1998);

U.S. Constitution, Amendments VI and XIV;  
Mo. Constitution, Article I, §§ 10 and 18(a);  
§§ 494.400 – 494.505, 494.465, RSMo (2000); and  
Rule 29.15.

## ARGUMENT

Petitioner was denied due process and equal protection of the law and a jury drawn from a fair cross-section of the population, guaranteed by the 6<sup>th</sup> and 14<sup>th</sup> Amendments to the U.S. Constitution and Art. I, §§ 10 and 18(a) of the Missouri Constitution, and §§ 494.400-494.505, in that the opt-out practice for qualified jurors in Lincoln County under which petitioner's jury was selected constituted a fundamental and systemic failure to comply with the statutory jury selection requirements under §§ 494.400-494.505, as held in *Preston v. State* and *State ex rel. Koster v. McCarver*.

Petitioner did not procedurally default this claim. He followed the procedure established in § 494.465 and filed an amended motion for new trial raising the issue within fourteen days of discovering the facts establishing the claim. Habeas corpus is the appropriate remedy to enforce this violation of his rights as the claim was not known to him during the time in which he could have raised the issue on direct appeal or in a 29.15 action. He has established prejudice because under *Preston* and *McCarver* prejudice is presumed in such situation.

A writ of habeas corpus can be issued when a person is held in detention in violation of the constitution or laws of the state or federal government. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d 210, 214 (Mo. banc 2001). Generally, claims that previously were governed by habeas corpus are now raised in a postconviction

action pursuant to Rule 24.035 (guilty plea) or 29.15 (trial). A petitioner who fails to raise such claims in postconviction proceedings is said to have procedurally defaulted on those claims. *State ex rel. Nixon v. Jaynes*, 63 S.W.3d at 214.

However, this Court has allowed exceptions where the petitioner can demonstrate that the claim was not known to him when he filed his postconviction motion or where a manifest injustice results. *White v. State*, 779 S.W.2d 571, 573 (Mo. banc 1989); *State ex rel. Simmons v. White*, 866 S.W.2d 443, 446 (Mo. banc 1993).

A habeas petitioner can overcome a procedural bar defense if he can show “cause” for not presenting his claims earlier in state court and “prejudice.” See e.g. *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). “Cause” as defined in *Murray v. Carrier*, 477 U.S. 478, 488 (1986), is a factor external to the defense or a cause for which the defense is not responsible. This claim was not known to Petitioner in time to challenge it at trial or include it in a timely filed **Rule 29.15** motion. Petitioner has established the requisite “cause” to have not raised this claim in his direct appeal or his Rule 29.15 motion. See *Amadeo v. Zant*, 486 U.S. 214, 222 (1987).

Unknown to Petitioner until his former direct appeal attorney (and current habeas attorney) learned of it on October 18, 2010 (Habeas Exhibits A-4, E-1 to E-16), at the time of Petitioner’s trial, the Lincoln County Circuit Court allowed jurors to “opt out” of jury service by performing six hours of community service and paying a fifty-dollar fee to cover the administrative costs of the community

service. *Preston v. State*, 325 S.W.3d 420, 421-422 (Mo. App. E.D. 2010). Five persons who were summoned for jury duty in Lincoln County during the court term encompassing Petitioner's trial took advantage of the "opt out" program. (Habeas Exhibit E-1 to E-16). These jurors who requested to be excused from jury service during the term of service that Petitioner's trial was held (July through October, 2005), were sent a letter by the presiding judge, the Hon. Dan Dildine, giving them the option to serve 6 hours of community service within 60 days at their convenience (and a fine not to exceed \$500.00 if they did not complete the community service). *Id.* Those six jurors chose the community service option and were allowed to opt out of jury service. *Id.*

On August 31, 2010, more than three years after Petitioner's direct appeal was decided, the Missouri Court of Appeals, Eastern District, issued its opinion in *Preston*, 325 S.W.3d at 421, wherein the Court held that, "the opt-out practice for qualified jurors in Lincoln County constituted a fundamental and systemic failure to comply with the statutory jury selection requirements," under §§ 494.400 – 494.505. The violation occurred when the Lincoln County Board of Jury Commissioners assembled the qualified jury lists for the term in which the jury at issue was constituted. *Preston*, 325 S.W.3d at 423. The court of appeals reversed the denial of Preston's Rule 29.15 motion, remanding for a new trial, and holding: the presiding judge's practice of allowing otherwise qualified jurors to opt-out of obligatory jury service was a fundamental and systematic deviation from the declared policy of §§ 494.400 – 494.505 because there was no judicial discretion

involved in the process; and, as a result, Preston did not need to demonstrate prejudice, contrary to the motion court's conclusion of law denying Preston's Rule 29.15 motion. **Preston**, 325 S.W.3d at 426.

The Court further held in **Preston** that "While we acknowledge the mandatory language of Section 494.465 [to file a motion asserting non-conformity with the statute, 'within fourteen days after the moving party discovers or by the exercise of reasonable diligence could have discovered the grounds therefor, whichever occurs later'], the statutory violation which Preston complains of occurred without his actual or constructive knowledge. The violation occurred when the Lincoln County Board of Jury Commissioners assembled the qualified jury lists for the term in which Preston's jury was constituted." **Preston**, 325 S.W.3d at 423. The State did not file an application for transfer to this Court in **Preston**.

Petitioner's trial was conducted in the same county and under the same procedures as in **Preston**. Five people from the term from which petitioner's jury was selected were excused for community service. Petitioner's trial was conducted under a fundamentally flawed procedure as in **Preston**, and he is similarly entitled to a new trial. A jury selected in violation of Chapter 494 jury selection procedures violated Petitioner's state and federal constitutional rights to due process and a jury drawn from a fair cross-section of the community. U.S. Const., Amends. VI, XIV; Mo. Const., Art. I, Sections 10 and 18(a); **Morrissey v. Brewer**, 408 U.S. 471 (1972); **Taylor v. Louisiana**, 419 U.S. 522 (1975).

The Missouri Court of Appeals, Eastern District, has held that not only can this issue be raised in a Rule 29.15 motion, but it also can be raised in a state habeas corpus proceeding if it can be shown that the movant had cause not to raise such a claim in a **Rule 29.15** proceeding. In *State ex rel. Koster v. McCarver*, 376 S.W.3d 46 (Mo. App. E.D. 2012), the Eastern District affirmed the judgment of the circuit court granting a writ of habeas corpus and ordering that the petitioner (Robert Gnade) be remanded for a new trial on the basis that he was unlawfully convicted due to the Lincoln County's invalid use of a juror opt-out system; the same county, and same opt-out procedure that was involved in Preston's and Petitioner's cases. This Court denied the State's application for transfer in that case on September 25, 2012, in SC92745, resulting in a new trial for Mr. Gnade.

The *McCarver* court held that where a defendant fails to utilize available post-conviction remedies to challenge jury selection procedures during the applicable time frame, he may petition for a writ of habeas corpus but must demonstrate cause and prejudice sufficient to overcome his procedural default. *Id.* at 53. In that case, as in Petitioner's, Gnade's claim was not known to him during appeal or the time available for filing for post-conviction relief. *Id.* at 53-54.

The *McCarver* court also held that Gnade had shown prejudice, and adopted the reasoning of its prior opinion in *Preston, supra*, which had held that prejudice in such situations should be presumed. *Id.* at 54. *Also see, McGurk v. Stenburg*, 163 F.3d 470, 474-475 (8<sup>th</sup> Cir. 1998), which on appeal from the denial of habeas corpus relief on a claim that the defendant was not informed of his right



to a jury trial, the Eighth Circuit Court of Appeals held that the denial of jury trial was a structural error where prejudice is presumed. *In accord, Owens v. United States*, 483 F.3d 48 (1<sup>st</sup> Cir. 2007), applying a presumption of prejudice standard in a habeas corpus action involving a claim of the denial of the right to a public trial.

If this Court holds that Petitioner must meet the cause and prejudice standard for habeas corpus, Petitioner has done so. As noted above, Petitioner did not know about the improper jury selection methods in Lincoln County until after his direct appeal and after his amended Rule 29.15 motion were filed. Cause has been established. And as held in *Preston* and *McCarver*, actual prejudice need not be shown because it is a structural error where prejudice is presumed. *Preston*, 325 S.W.3d at 426; *McCarver*, 376 S.W.3d at 54.

Arguably, however, Petitioner should not have to meet the general cause and prejudice standard typically involved in a state habeas corpus action because he did not deliberately bypass his right to challenge the jury selection method because he timely pursued his claim under § 494.465.1, which gives a party statutory authority to move for “appropriate relief ... on the ground of substantial failure to comply with the provisions of sections 494.400 to 494.505 ... within fourteen days after the moving party discovers ....the grounds therefor.”<sup>4</sup>

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<sup>4</sup> Petitioner recognizes that the *McCarver* court held that although the language of § 494.465 provides some support for Petitioner’s argument, which would permit

Under § **494.465**, where there has been a substantial failure to comply with the statutory jury selection procedures, which both *Preston* and *McCarver* held was present in Lincoln County, a party may move appropriate relief “at any time before the petit jury is sworn to try the case or within fourteen days after the moving party discovers or by the exercise of reasonable diligence could have discovered the grounds therefor, whichever occurs later.” It is the *whichever occurs later* language that controls – only actual knowledge of the violation matters under that language.

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defendants to challenge their convictions under that statute without having raised the issue in a *Rule 29.15* proceeding, the *McCarver* court held that “where a defendant fails to utilize available post-conviction remedies to challenge jury selection procedures during the applicable time frame,” he does not avoid “default” of his claim by fling a motion for new trial under § **494.465**; rather, he “may petition for a writ of habeas corpus but must demonstrate cause and prejudice sufficient to overcome his procedural default.” *McCarver*, 376 S.W.3d at 52. But because Petitioner did not know about the claim until after his amended Rule 29.15 motion was filed, Petitioner disagrees with that aspect of the *McCarver* opinion and believes that § **494.465** is the appropriate vehicle since by its own terms it allows such a motion to be filed within the time limit that Petitioner filed his motion.

Within fourteen days of actual discovery of the issue (October 18, 2010), Petitioner filed an amended motion for new trial in the Circuit Court of Lincoln County on October 25, 2010, which alleged that the opt-out practice for qualified jurors in Lincoln County constituted a fundamental and systemic failure to comply with the statutory jury selection requirements, under §§ **494.400-494.505**. (Habeas Exhibit A-11 to A-15). Thus, Petitioner timely pursued his claim since under § **494.465.1**, a party is given statutory authority to move for “appropriate relief ... on the ground of substantial failure to comply with the provisions of sections 494.400 to 494.505 ... within fourteen days after the moving party discovers ....the grounds therefor.”

Petitioner followed the procedure set out in § **494.465**, and held to be appropriate in *State v. Sardeson*, 174 S.W.3d 598 (Mo. App. S.D. 2005) and *Preston, supra*. Within fourteen days of actual discovery of the issue (October 18, 2010), he filed an amended motion for new trial in the Circuit Court of Lincoln County on October 25, 2010 (contained in Habeas Exhibit A). § **494.465**.

In *Sardeson*, an amended motion for new trial was filed within fourteen days after the actual discovery of a violation of statutory jury selection procedures. The Southern District Court of Appeals held that the amended motion for new trial therefore preserved the issue for review. *Id.* at 600. A “substantial failure to comply with the statutory mandate regarding a random selection of the jury panel” gave the Court of Appeals “no choice but to reverse this conviction and remand it for a new trial.” *Id.* at 602. Although *Sardeson* involved a case where the error

was discovered after trial and after the initial motion for new trial was filed, but prior to sentencing, its reasoning still applies in a situation like Petitioner's wherein the § **494.465** motion is filed within fourteen days of actual discovery of the issue.

The Lincoln County "community service" option to jury duty violated Chapter 494, RSMo 2000, Missouri's authorized method of jury selection. Petitioner respectfully requests that this Court grant this writ of habeas corpus and order that the judgment and sentence in Lincoln County Case No. 04L6-CR01535 be vacated, and that the case be remanded to Lincoln County for a new trial.

## CONCLUSION

For the reasons presented, petitioner William J. Sitton prays that this Court issue a writ of habeas corpus vacating his convictions for the crimes of involuntary manslaughter in the first degree, § 565.024 (Count 1), and armed criminal action, § 571.01 (Count 2), and remand the case to the Circuit Court of Lincoln County for a new trial and grant such other and further relief as the Court deems just and equitable.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE AND SERVICE**

I, Craig A. Johnston, hereby certify as follows:

The attached brief complies with the limitations contained in Rule 84.06(b). The brief was completed using Microsoft Word, in 13 point Times New Roman font, and includes the information required by Rule 55.03. According to the word-count function of Microsoft Word, excluding the cover page, the signature block, this certificate of compliance and service, and the appendix, the brief contains 3,789 words.

On the 5th day of April, 2013, the foregoing brief was placed for filing and delivery through the E-file system to Stephen D. Hawke, Assistant Attorney General, at [stephen.hawke@ago.mo.gov](mailto:stephen.hawke@ago.mo.gov). The electronic file has been scanned for viruses using Symantec Endpoint Protection, updated on April 5, 2013, and according to that program, the file is virus-free.

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